IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 587-589

EDWIN J. CREEL
Petitioner

vs.

ROBERT T. CREEL
Respondent

PETITION OF EDWIN J. CREEL, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

FOR REVIEW OF DECISIONS OF THAT COURT DISMISSING APPEALS NOS. 8,770 AND 8,823 AND AFFIRMING IN NO. 8,910.

EDWIN J. CREEL,
in proper person.

INDEX.

CASES CITED.

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PETITION FOR WRITS OF CERTIORARI FOR REVIEW OF DECISIONS DISMISSING APPEALS NOS. 8,770 AND 8,823 AND AFFIRMING IN NO. 8,910.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edwin J. Creel, prays that a writ, or writs, of Certiorari issue to the United States Court of Appeals for the District of Columbia, to review various portions of a judgment entered in the above entitled cause on May 21, 1944; and which said portions of said judgment decreed dismissal of petitioner's Appeals No. 8,770 and No. 8,823, and which entered an affirmance in No. 8,910.

The Sister Petition.

A second appeal by petitioner, No. 8,823 was also dismissed by that same Judgment, on the motion of Respondent, and on the ground that it too had been taken from a non-appealable order.

In a third appeal by petitioner, No. 8,910; the order appealed from — an Order Finally Confirming the Sale of the Partnership Business to Respondent, (R. 524) — was affirmed.

For reasons later stated, it has been considered advisable to treat these two further appeals, as a second unitary group. These two further appeals, have, therefore, been covered in a separate, but sister petition.

The underlying statement of fact, for all three appeals however, is included principally, in this present petition and brief.

Jurisdiction.

The judgment complained of (R. 913) was entered as to all three appeals on May 21, 1945. A timely motion for rehearing was filed on June 5th (R. 914). Motion for rehearing denied June 6th, (R. 922).

On September 5th, petitioner was granted an extension of time to October 6th for filing petitions for certiorari, (R. 929). On October 5th petitioner was granted a further extension of time to November 5th, for filing petitions for certiorari, (R. 929).

Jurisdiction rests on Sec. 240 (a) of the Judicial Code as amended by Act of February 13, 1925.

Statute Involved.

Sec. 101, Title 17, of the District of Columbia Code, 1940; is of particular importance as to the two dismissed appeals No's 8,770 and 8,823; because of the unusual jurisdiction, that is given the Court of Appeals of the District, as to appeals from interlocutory orders.

The relevant portions of that Section are as follows:

> "*Any party aggrieved by any final order, judgment, or decree* of the District Court of the United States for the District of Columbia, or any Justice thereof, may appeal therefrom to the said Court of Appeals.
>
> *Appeals shall also be allowed* to said Court of Appeals *from all interlocutory orders* of the District Court * * * *whereby the possession of property is changed or affected*, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like." (Italics added.)

Federal Rule Involved.

Rule 54-b. Federal Rules of Civil Procedure.

> "Judgment at various stages. *When more than one claim for relief is presented in an action*, the court at any stage, *upon a determination of the issues material to a particular claim, and all counterclaims arising out of the transaction* or occurrence which is the subject matter of the claim, *may enter a judgment disposing of such claim.*
>
> *The judgment shall terminate the action with respect to the claim so disposed of*, and the action shall proceed as to the remaining claim."

Brief History of the Litigation.

The three present appeals have originated in the partnership dissolution, receivership, and accounting case of Creel v. Creel, equity 55,407, in the District Court of the United States for the District of Columbia.

The Bill of Complaint (R. 2) was filed by Respondents, on Feb. 28, 1933. A receiver was appointed on March 31, 1933. The appointment of the receiver was affirmed on Appeal, June 25, 1934; 63 App. D. C. 384; 73F. 2nd, 107. Petition for Certiorari was denied by the Supreme Court; 294 U. S. 723.

No other appellate decisions on the merits, have been rendered in the case, excepting only the decision on the present three appeals. This is reported in 149 F. 2nd 830, and is also printed in the record, (R. 913).

The Partnership Business.

The partnership business involved is that of Creel Bros., a comparatively large auto-parts jobbing and electric service business of 1811 14th St. N. W., Washington, D. C.

The business assets had an appraised value on Feb. 1st, 1944, of approximately $220,000, exclusive of some $79,000., in the bank balance of the firm as of that date (R. 368). And since the firm had raised its balance to $140,000 on Jan. 15, 1944, with bills paid (R. 902) it can be estimated that the business in earning approximately $70,000 per year.

It can also be fairly estimated, that the firm now has a net worth in excess of $450,000; and also that the firm now has over $200,000 in its bank balance.

The Partners Interests.

The partnership business was founded by petitioner in 1919. A few months later, Respondent, petitioner's younger brother, was taken into the partnership on a 40% basis. A little later petitioner gave him an additional 10% interest. Since that time each partner has owned a ½ interest;

except that through an allegedly corrupt finding of the Auditor, (R. 284), Respondent was given credit for an alleged excess capital contribution of $4933.60. (R. 174.)

General Purpose of the Three Appeals.

Certiorari is sought in this cause, under two general phases of this Court's jurisdiction.

That is: Certiorari is sought under the more general supervisory powers of the Court; for general review and correction of an alleged criminal abuse of receivership, that has been carried on against this petitioner, in this suit, for more than 12½ years past.

This more general conspiracy has had for its original object, the seizure of control, of a valuable partnership business, through abuse of this receivership; and with the primary aim, that the control of the partnership business, would be turned over to Respondent, as manager under the receiver; that he himself had had appointed more than 12½ years ago.

A second aim of the said conspiracy was, that by that means, it was proposed to have petitioner's income shut off, through the seizure of all of petitioner's property; and so that thereby, petitioner would ultimately be compelled to sacrifice his interests in the partnership, to Respondent, the plaintiff partner.

And this fraudulent scheme—in its more general aspects—has been carried on against petitioner, and under this receivership, for more than 12½ years past.

The More Specific Review Requested.

Within the past four years, however; a change has appeared in the general aim of the conspiracy. That is, it

is no longer a scheme merely to hold control of the partnership business, and to shut of petitioner's income thereby.

Instead in this later phase; the aim has been to put the partnership business up for sale, under conditions which might seem to indicate a fair public sale; but which conditions actually were so arranged, that a purchase by any one else than petitioner, would be defeated by the Receiver; or by attempted intimidation, through threats of loss of the firm's agencies, or employees.

And out of this last phase, has arisen petitioner's request for a more specific review and reversal, of the three orders appealed from under the present three appeals.

In Appeal No. 8,770 petitioner asks for reversal of an order of resale that was entered against this petitioner on March 22, 1944.

That is, on Feb. 1st, 1944, the partnership property was sold at public auction to petitioner, at a bid price of $240,500. Petitioner's right, however, to complete that purchase, was defeated by the illegal demands of the receiver, as to the amount payable as balance due on the property.

And on petitioner's refusal to complete the purchase of the property, on the receiver's terms; the Receiver then had an order of resale entered against petitioner.

That said Order of Resale, (R. 339) of March 22, 1944; held petitioner in default; ordered the return of a $10,000 deposit to petitioner; and further ordered the resale of the property at petitioner's risk and cost.

Appeal No. 8,770 was Taken from that Order of Resale. And in that appeal, No. 8770, petitioner asks that the said Order of resale be set aside and quashed; that the

property be ordered turned over to this petitioner; at the bid price of $240,000; and as of the original sale date of Feb. 1st, 1944; and under the terms of the original order of sale; as those terms might be properly interpreted and determined by this Court.

The Second Appeal No. 8823.

The property was again offered for sale, under the said Order for resale, on May 1st, 1944. At that time, it was apparently supposed, that petitioner would be afraid to again bid on the property; and so that the property could then be sold to Respondent.

However, the order for resale was so framed, by a reference to the original order of sale, as to give petitioner a specific right to bid on the property; and to become the purchaser at the resale.

As the said supposed resale on May 1st, therefore; petitioner again outbid, respondent. And under those conditions, the Receiver then stopped the sale, and merely took deposits and the bids of the two parties, to report to the Court.

Then in seeming disregard of statutory provisions; Mr. Justice Goldsborough, on May 24th entered a so-called "Order on the Receiver's petition for instructions." (R. 466.)

This said Order, of May 24th, provided for neither a public nor a private sale; these being the only two forms allowed by statute. Instead, that order provided that Petioner should have the right, for 30 days, to purchase the property at $240,500; but provided that the purchase be completed within 30 days. *No one however, was authorized to sell the property to petitioner.*

Since petitioner had a valid appeal pending in No. 8,770; petitioner refused to attempt to buy the property under that illegal scheme; although the price was supposed to be the same. Instead, petitioner preferred to rely on his appeal, No. 8,770; and one reason was, that the assets that were supposed to be sold under that order of May 24th, could not be identified.

On June 23rd, therefore; and for the purpose of blocking the obviously intended sale to Respondent; petitioner filed notice of his second appeal No. 8,823, as against the "Order on the Receiver's petition for instructions" of May 24th.

Petitioner's Third Appeal, No. 8,910

The said Order of May 24th, provided further that if petitioner failed to complete the purchase within 30 days, and which would have been an impossibility—that then Respondent should have the right to buy the property at $240,000; provided that Respondent put up a deposit of $10,000; and provided that he completed the purchase, within a further 30 days.

Immediately after the expiration of the 30 days allowed for purchase by petitioner; *the Receiver then accepted the offer* of Respondent, to purchase the property; and Respondent paid down the $10,000 deposit. (R. 471-476.)

The Receiver was not authorized to accept the said offer. But, nevertheless, the Receiver reported the matter to the Court; although it would have been impossible for Respondent, under the law, to hove completed the purchase within 30 days.

Furthermore, under the Order of May 24th, under which Respondent "purchased" the property, it was physically impossible to identify the assets, supposedly sold to Re-

spondent. And this error continued all through the further proceedings, and including the final confirmation of the sale to Respondent.

It appears that the acceptance of an offer, by an official authorized to sell, is all that a judicial sale at public auction amounts to. For the acceptance of the high bid, at a judicial sale, at public auction; is always accepted subject to confirmation by the Court.

And in Brignardello vs. Gray, 68 U. S. 627; 17 L. Ed. 693; this Court held that "An officer of the court may erroneously suppose that the power to sell is given by a decree, yet if he does sell, his act is without authority of law, and is void."

It would appear that the Receiver's acceptance of Respondent's offer to buy; must likewise be void, and also—as in Brignardello vs. Gray—that a later confirmation by the Court would do nothing to remedy the defect.

In any case, the existence of that defect was sufficient to deter petitioner from attempting to purchase the property under the Order of May 24th. And that, it would appear, under other rulings of this Court, would indicate a sufficient chilling of the bidding to void the sale, to Respondent, in any event.

Respondent did not of course complete the purchase, within the 30 days, as required by the order of May 24th.

Instead on Aug. 30, 1944; or more than 30 days later; an Order Nisi was entered by the District Court. That Order Nisi confirmed *the acceptance of the said offer*, of Respondent, by the Receiver. That Order Nisi further provided, that the said sale to Respondent, should be finally ratified and confirmed, unless cause to the contrary be

shown, or a higher offer acceptable to the Court, be made on or before Oct. 9th.

Again it was petitioner's opinion that that procedure failed completely to conform to the statutory requirements, for either a public or a private sale. And petitioner again refused to make any counter offer, under that Order Nisi, even though an additional $30,000, or $40,000 of profits, had piled up in the business, since the sale to petitioner, at the bid price of $240,500, on Feb. 1st.

And this appearance of illegality, as a means of chilling the bidding, would again seem, under repeated rulings by this Court, as an all sufficient bar to the validity of the sale to Respondent.

Furthermore, as before stated, the assets supposedly sold to Respondent cannot be identified. (R. 916, par. 30-31.) Also the terms of such sale, if it was a private sale, were never advertised as required by statute. Instead only a copy of the Order Nisi was published, and it merely states that the terms are all cash, subject to the terms of the order of May 24th, and these terms were not advertised.

Finally, it would seem from various decisions of this Court, that it would be held that the specific provisions of the third "subdivision" of Sec. 947; overrules the more general 4th "subdivision", and which last "subdivision" permits a private sale of land. And if the so-called third "subdivision" does control; then any interest in land, *if it is in the hands of a receiver*, must be sold at public sale.

But however, this may be; the irregularity of the proceedings was so great as to completely "chill" any bidding by this petitioner, despite the accumulated $30,000 or $40,000 of profits, meanwhile.

For this reason among others; petitioner made no competitive offer, under the terms of the Order Nisi; nor did anyone else.

And so, on Oct. 9th, 1944, the sale of the partnership business was finally confirmed to Respondent by the District Court.

It was from that Order Finally Confirming Sale, that petitioner's third appeal, No. 8,910 was taken.

SHORT AND SUMMARY STATEMENT OF THE SUBJECT MATTER OF APPEAL NO. 8,770.

As set out in the general statement covering the three appeals; the present appeal No. 8,770, was taken from an order of resale entered against petitioner, on March 22nd, 1944.

The important preceding events of this appeal No. 8,770 are as follows:

The business was sold to petitioner on Feb. 1st. (R. 264.) Sale confirmed to petitioner, with consent of Respondent on Feb. 9th. (R. 283.) Allegedly fraudulent demands made on petitioner, by the Receiver, February 20, to March 4th or 8th. (R. 379; R. 368-369.)

On March 10th prior to the settlement date at the close of that day, March 10th, the petitioner filed notice of appeal (R. 298) from the order confirming sale to petitioner. Since that appeal covered the same subject matter, petitioner contends that thereby the jurisdiction over the entire subject matter was transferred to thte Court of Appeals, as of the afternoon of March 10th; and that the running of the time limit against petitioner, was — apparently — stopped before the expiration of that time limit.

On March 22nd, or ten days after jurisdiction was transferred to the appellate Court, an order of resale (R. 339) was entered against petitioner.

By that order of Resale, petitioner was held in default; the $10,000 deposit was ordered returned to petitioner; and *the assets that had been sold to petitioner on Feb. 1st, were ordered resold* at petitioner's risk and cost.

It would appear that the whole theory of that order of resale, was not to set aside the sale to petitioner; but instead, to hold petitioner to the purchase; and to resell the assets as being petitioner's property; and, of course, at petitioner's risk and cost.

A more detailed statement of the subject matter of that appeal follows:

Fraudulent Character of the Receivership.

In March, 1933, all of this petitioner's property, to an estimated amount of at least $100,000; was seized through the receivership, and the entire property was then turned over to the control of Respondents, the plaintiff partner, as manager under the receiver. (R. 227.)

By that fraudulent but successful means; Respondent has not only ousted petitioner from any share of interest in the control of the partnership business; but further, plaintiff has thereby secured for himself a salary of $100 a week; and so the Respondent has by now been illegally paid more than $65,000 of the firm's funds, as a so-called salary from the receiver. (R. 224, R. 251.)

Meanwhile, during the first 10½ years of the receivership; petitioner's income was almost completely shut off; and so that—while the business is estimated to have

earned more than $300,000 during the period—and while Respondent was being paid more than $50,000, as aforesaid—petitioner was given a total allowance from his property, during that same 10½ years, of only $4,130. (R. 224.)

But, after more than 10 years, of that attempt to blackmail this petitioner, into a surrender of petitioner's interests in the partnership, to Respondent; it seemingly became apparent to Counsel for Respondent, that petitioner could not be coerced in that fashion.

And so, in 1942, after nearly 10 years of that blackmail attempt, a change was apparently made in Respondent's plan. For a scheme was then undertaken to but the partnership business up at auction sale (R. 201), but under conditions such that only Respondent could become the purchaser.

That is, it was obvious that no outsider would dare to and on the property—unless the business were being sold at an enormous sacrifice—because the business is of a highly technical agency character;

And since Respondent has been in practically complete control of the business, for the past 12½ years, as manager under the Receiver; he has had unlimited opportunity to alienate and secure practical control for himself of the vital agencies of the firm.

And if, therefore, any outsider should have ventured to purchase the property, Respondent could then have taken away the agencies, and the trained personnel, and have started up an opposition business; and could thus have left a mere wreck of the business, that, supposedly, had been sold to the purchaser. (R. 275.)

The Order for Sale

The Order for Sale, (R. 231) was obtained on motion of Respondent, (R. 201) — in accordance with the provisions of Rule 54-b of the Federal Rules of Civil Pracedure — and on the repeated assertions of Respondent, that all questions as to the rights and interest of the parties, in the assets, had been finally settled and determined, (R. 201; R. 246).

Terms of the Order of Sale.

By the terms of the Order of Sale, (R. 231-232); all assets of the partnership, of every kind, both real and personal, and including good will, and accounts receivable — and excepting only "cash on hand" — were to be sold at public sale.

It was further provided in the said Order for Sale (R. 233), that—

(a) Either partner could bid for and purchase at said sale the assets sold; and

(b) Should either partner become the purchaser, he should be entitled,
at the final settlement and payment of the purchase price,
to use and apply *toward the payment of such purchase price,*
such amount as the receiver may fairly estimate, to be his (the purchaser's) distributive interest in and to the said partnership assets.

It was also provided in the said Order for sale, (R. 233), that

The receiver is authorized and directed to continue to conduct the said business,
until the final confirmation and consummation of said sale,

accounting to the purchaser thereof,
for the proceeds of said business,
during the interval between sale and final confirmation and payment of the purchase price,
less the expenses of the conduct thereof, during such interim.

It was further provided in the said Order for sale, (R. 233), that—

Upon the final settlement of sale, the said Robert T. Creel, and Edwin J. Creel, are each hereby required and directed to join in, execute, acknowledge and deliver a conveyance of the real estate to the purchaser.

Also that—

Terms of sale to be complied with within 30 days, from the date of the final confirmation of sale.

The Sale to Petitioner.

At the public auction of Feb. 1st, 1944; Respondent bid first, $160,000. Petitioner raised Respondent's bid $500 each time; until at $240,000, Respondent dropped out. The property was then sold to petitioner, at the bid price of $240,500. (R. 328.)

Confirmation of Sale to Petitioner.

The sale was confirmed to petitioner, on Feb. 9th, on motion of the Receiver—and with the consent of Respondent. (R. 290.)

Objections of Petitioner to Form of Confirmation.

Petitioner also asked confirmation of sale. But petitioner objected to the form and manner in which the confirmation was rushed through by the receiver. (R. 268.)

Petitioner objected:

(a) That the Receiver had rushed through the hearing on confirmation, without motion and notice, as required by District Court Rules.

(b) That petitioner was given but four days notice, instead of the five required by rule.

(c) That this short notice, made the time for settlement, under the thirty day limit, to fall on March 10th, instead of on March 11th.

(d) This meant that the cash received on the day of heaviest cash receipts, March 11th, was thus not available to petitioner to apply on the purchase price. And whereas, had petitioner been given proper notice of five days; the settlement date would have fallen on March 11th; and petitioner would have an additional $10,000 or so, available from the March 11th, receipts.

Still further, had petitioner been given a normal time to consider the form of the order for confirmation, and to permit petitioner to make the motion for that confirmation; and if thereby the time for settlement, had been delayed until after the fifteenth; an additional sum of perhaps $15,000, or a total further sum of perhaps $25,000 cash would have been available, to petitioner, to apply on the purchase price of the property.

And that additional $25,000 cash might have meant the difference between petitioner's being able, or being unable, to complete the purchase within the 30 day time limit set by the order for sale.

(e) Any such attempt to "pinch" petitioner's available funds, was particularly reprehensible, because at the time the Court was holding an estimated $150,000 of petitioner's property; and which property had been

seized by the Court, only on Respondent's mere request for the appointment of a receiver.

(f) This whole hurried action was therefore an open attempt on the part of the Receiver to prevent completion of the purchase by petitioner.

Petitioner objected further to the form of the order, and to the manner, of confirmation.

And in this respect, petitioner relied on the holding by this Court in Pewabic Mining Co. vs. Mason, 145 U. S. 349; 36 L. Ed. 732, where the Court said:

> "The Chancellor will always make such provisions for notice and other conditions (of a judicial sale) as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, *he will certainly, before confirmation, see that no wrong has been accomplished in it by the manner in which it was conducted.*"

And on this basis, petitioner objected to the manner of confirmation, (R. 290), both as to the manner in which it had ben rushed through; and also to the fact that the District Court Mr. Justice, Goldsborough, refused to include in the order of confirmation, suitable provisions that would have protected petitioner against the fraudulent demands that; in petitioner's opinion, it was obvious that the Receiver would make, and so that thereby, petitioner's right to complete the purchase would be defeated.

Variance between Order for Sale, and Order Confirming Sale.

It may be seen from the notice of service, by the receiver, (R. 268) as to the filing of his report of the sale; that petitioner was not supplied with any copy of the proposed order of confirmation.

It may further be seen, from the transcript of the hearing before Mr. Justice Goldsborough, (R. 284-298), that the confirmation of the sale to petitioner, was handled as a mere preliminary matter. And no motion for confirmation was made as required by District Court Rules, (R. 277).

It may further be seen from that obviously imperfect transcript, that the Court handled the matter of confirmation, as a mere matter of course. It may also be seen that no copy of the proposed order of confirmation, was submitted to petitioner, before it was signed by the Court.

And when that said order of confirmation was later seen by petitioner; it was then apparent that there was a grave variance, between the terms of the Order for sale, and those of the Order for confirmation.

That is, the Order for sale provided, as before set out, that on completion of the purchase, both parties were required to sign and execute a deed of the property to the purchaser. The order for confirmation, however; provided that the Receivers, instead of Respondent, was to execute the deed. And this variance, in the terms of the order of confirmation; was unacceptable to petitioner.

The fact of this variance, and of the failure of the court to include provisions for protection of petitioner against the alleged fraudulent demands of the Receiver; was later made a basis of appeal, by petitioner, against that order of confirmation.

The fraudulent false "estimate" by the Receiver.

As petitioner had expected, a still further fraudulent scheme had been planned by the Receiver, and by Respondent, and by Counsel for Respondent.

And this plan was, that should petitioner become the purchaser, at the auction; that the Receiver should then make such excessive demands as to the amount to be paid by petitioner as the balance due on the property — and over and above the credit for petitioner's admitted half interest in the partnership — that petitioner would refuse to complete the purchase, on the basis of the Receiver's said exhorbitant terms. (R. 330).

And this plan was then actually carried out. For the Receiver demanded that petitioner pay him some $62,248 more than the Receiver's own figures, (R. 369), showed to be due and payable by petitioner, on the property.

That is, the Receiver demanded, (R. 392) that petitioner pay him over again, for some $2248 of miscellaneous credits, (R. 392) insurance paid ahead and the like, that had been sold to petitioner, along with all the other assets of the business exceptng "cash on hand."

The receiver made a further illegal and fraudulent demand that petitioner should pay him an additional $60,000 in cash, to cover receivership costs, and which — the receiver said — Respondent now claimed, should be assessed against this petitioner.

Prior to the time of the supposed settlement date, the receiver refused to give any explanation of these demands; other than that $40,000 of the said amount was for receivership costs estimated to have been previously paid; while $20,000 was for receivership costs, estimated to be payable in the future.

Later, (R. 368-369) the receiver gave petitioner the further explanation that $35,000 of the said $40,000 was for costs actually paid heretofore; while $5,000 was for costs not yet paid of the former sale to petitioner. The basis

for the estimated $20,000 of future receivership costs was still not stated.

For reasons before stated, petitioner charges that there is nothing in the Order of sale which authorizes the receiver to demand; either that petitioner pay him $60,000 in cash for receivership costs which either he or Respondent "estimates" should be paid by this petitioner; nor is there any authorization for him to demand that petitioner pay him a deposit of $60,000 to cover costs of the receivership which the receiver estimates might be assessed against petitioner in the future.

But, even if there were such authorization for the Receiver to demand some such payment by petitioner; there would still be a $37,000 mistake in his figures.

And this is true, because of the $35,000 of receivership costs already paid; that entire amount has already been paid out of the partnership funds. One-half of that amount was paid out of petitioner's share in those funds; or a total of some $17,500 has already been paid of that amount by petitioner; and yet the receiver demanded the petitioner pay that $17,500 over again.

But the Receiver also demanded petitioner pay him an additional $20,000 to cover receivership costs estimated to be payable in the future.

The facts are however, that if petitioner had paid the $40,000 previously set out; and if the business had then been turned over to petitioner; the receivership would have been terminated, so far as the business is concerned; and there would have been no future receivership costs.

Petitioner charges therefore, that there was nothing in the order for sale, which authorizes the Receiver to assess

the costs of the receivership against this petitioner. Further, and such provision would have been wholly illegal and void, had it been so inserted.

But, even though the receiver might have been empowered to make such as assessment of receivership costs against this petitioner; or to require this petitioner to make a deposit with him, to cover such costs, if they should be assessed against petitioner; there would still have been a mistake of some $37,000 in his figures, and an excess of that amount in the demand which he could have made on petitioner.

Petitioner charges therefore that petitioner was not required to meet the illegal demand of the receiver; that petitioner pay either the $2,248.77 for items that had already been purchased by the petitioner in the bid price of $240,500; nor the $17,500 of receivership costs that had previously been paid by petitioner; nor the $20,000 for future receivership costs of a receivership that would have terminated had petitioner paid the $40,000 of costs previously paid; nor even the remaining $17,500 which the receiver said that Respondent claimed should be assessed against this petitioner.

And since petitioner was not required to meet any such illegal demand that petitioner pay some $62,248.79, over and above the amount which the receiver's own estimate showed to be the balance due by petitioner; Respondent was not a fault in his failure to consummate the sale under those conditions.

By the receiver's letter of March 4th, (R. 379) which transmitted the Receiver's estimate (R. 368-369) of the amount payable as balance due to the property; it was apparent that the Receiver intended to maintain his position as to the demands he had made.

On the afternoon of March 10th, therefore, and prior to the expiration of the time limit set for settlement under the order of confirmation, (R. 283), petitioner filed notice of appeal from that said order of confirmation; and thereby transferred jurisdiction of the entire subject matter to the appellate Court.

Nevertheless, on March 22nd, or ten days later; the District Court on the request of the receiver, entered its order of Resale, (R. 389) against this petitioner.

Petitioner's grounds for complaint against that Order for resale, have already been set out in part, and will be further apparent, from the statement of the Questions Presented.

On May 1st, therefore, petitioner filed his notice of appeal (R. 340) against that said order of resale. The Court is therefore respectfully referred to petitioner's statement of questions presented, for the fuller statemnt of Petitioner's objections to the said Order of Resale.

QUESTIONS PRESENTED

On March 22nd, 1944, the District Court entered its "Order for Resale" (R. 309); and which said order for resale: (a) Held petitioner in default; (b) ordered the return of the $10,000 deposit to petitioner; and (c) Directed the resale of the property at petitioner's risk and cost.

Appeal No. 8,770 was taken from that order of resale. It should therefore be observed that the requirements for an appealable order, under D. C. Code and that petitioner *must have been aggrieved thereby;* and that the said order *must*

either have been a final order; or, it must have been *an interlocutory order "whereby the possession of property is charged or affected."*

The questions presented, are in principal part:

I. Whether the Court of Appeals erred in dismissing appeal No. 8,770 as having been taken from a non-appealable order.

That is:

I-A. Whether the Court below erred in failing to hold: *that petitioner was aggrieved* by the terms of that order; that is (a) because petitioner was thereby stripped of the right to have a business earning $70,000 a year turned over to him; and (b) because the property was then to be resold at petitioner's risk and cost.

I-B. Whether the Court below erred in failing to hold: that the said order of resale *was appealable as a final order:*

(a) Under the rule of Kneeland vs. American Loan, 136 U. S. 89; 34 L. Ed. 379; that is, that a *purchaser at a judicial sale*, acquires thereby a right of appeal against any subsequent order, that adversely affects his interests; or (b) Under the Rule of Forgay vs. Conrad, 6 How. 210; 12 L. Ed. 404; that an interlocutory order is final and appealable, *if it is immediately executable;* and *if material injury could be caused* to a party thereby.

I-C. Whether the Court below erred in failing to hold, that the said order of resale was appealable, *as "an interlocutory order whereby the possession of property was changed or affected."* That is:

(a) Whether the order for the return of the $10,000 deposit to petitioner, was not a release of a lien on that $10,000, and so that thus the possession of property was affected?

(b) Whether the return of the $10,000 deposit to petitioner was not also a change in the possesssion of property?

(c) Whether that order of resale which held petitioner in default, did not strip petitioner of a valuable property right; this said right being the right to have a property earning $70,000 a year, turned over to petitioner, on payment of the purchase price?

(d) Whether the value of that right, is not shown by the fact, that the present three appeals were taken by petitioner to re-establish that right for petitioner?

(e) Whether the value of that right, is not shown by the fact that the litigation for the past 20 months, has been a contest almost exclusively over that right?

(f) Whether the value of that right, is not shown by the fact that it can be estimated that the ownership of over $130,000 of earnings of the business, that have accumulated since the date of the sale to petitioner, on Feb. 1st, 1944—will be determined by the decision as to the ownership of that right.

II. Whether the Court below erred in failing to hold:

(a) *That the said Order for Resale must be set aside and quashed:* because—by reason of the filing of the appeal by petitioner, on March 10th, (R. 298) from the or-

der confirming sale of the property to petitioner, (R. 283); all jurisdiction over the subject matter was transferred to the Court of Appeals; and so that the Order of Resale, as entered by the District Court on March 22nd, was wholly null and void; and

(b) Whether the Court below erred in failing to follow in this respect, the applicable decision of this Court in Newton vs. Consolidated Gas, 258 U. S. 177; 66 L. Ed. 548.

III. Whether the Court below erred in failing to hold that the *said Order for Resale, must be set aside and reversed* as erroneous because petitioner was not guilty of default:

(a) Because the said default of petitioner had been due solely to *illegal and fraudulent demands* made on petitioner by the receiver, as to the balance due on the property; and

(b) Because—by reason of the filing of petitioner's appeal on March 10th, (R. 298) against the order confirming the sale to petitioner; the execution of that decree of confirmation was stayed; and the running of the time limit was thus stopped, before the expiration of the time allowed petitioner for settlement; and so that no default on petitioner's part was therefore possible.

IV. Whether the Court below erred in failing to hold and direct: that since the *alleged default was not due to any fault of petitioner;* that *the sale of the partnership business to petitioner must be completed;* and that the property must be turned over to petitioner, as of the original sale date of Feb. 1, 1944; and at petitioner's bid price of $240,500; and under the terms of the original order of sale, as those terms should have been properly interpreted by the Appellate Court.

V. Whether the Court below erred in failing to hold and direct that *Respondent must account to the partnership*, for the more than *$65,000 that has been paid him as a so-called salary by the receiver*, during the 12½ years of this receivership.

VI. Whether the Court below erred in failing to hold and direct that the final terms of settlement by petitioner for the partnership property, shall be made subject to a proper accounting between the partners as to partnership affairs.

Specification of Errors to be Urged.

I. The Court below erred in dismissing appeal No. 8,770 and No. 8,823 as having been taken from non-appealable orders:

That is:

I-A The Court below erred in failing to hold that the order for resale, in appeal 8,770, meets one of the requirements for an appealable order, and that is, that petitioner was aggrieved thereby; and in that—

(a) That petitioner was stripped of a valuable property right by that said order; and

(b) That the property was ordered resold at petitioner's risk and cost.

I-B The Court below erred in failing to hold that the said order of resale, meets the second requirement for an appealable order; and that is that the said order was appealable as a final order; and in that—

(a) The said order was a final order under the rule of Kneeland vs. American Loan, 136 U. S. 89; 34 L. Ed. 379; and in that a purchaser

at a judicial sale has a right of appeal against any order that adversely affects his interests.

(b) The said order was a final order under the rule of Forgay vs. Conrad, 6 How. 210; 12 L. Ed. 404; and in that the said order was immediately executable, and could cause great injury to petitioner.

I-C The Court below erred in failing to hold that the said order of resale, meets the second requirement for an appealable order under the District of Columbia Code; and in that it is an interlocutory order whereby the possession of property is changed or affected. That is—

(a) The the said order stripped petitioner of a valuable property right.

(b) That the said order changed the possession of property, by directing the return of a $10,000 deposit to petitioner; and by holding petitioner's remaining property subject to a claim for payment of any losses resulting from the resale.

II-a The Court below erred in failing to hold that the Order for Resale must be set aside and quashed:— because, by reason of the filing of petitioner's appeal of March 10th, 1944; and which covered the same subject matter—the District Court had no jurisdiction over the subject matter to enter that said order of resale.

II-b The Court below erred in failing to follow the applicable decision of Newton vs. Consolidated Gas, 258 U. S. 177; 66 L. Ed. 548; that is, that the filing

of a valid appeal, transfers jurisdiction over the subject to the Appellate Court.

III. The Court below erred in failing to hold that the said order for resale; must be set aside and reversed, because petitioner was not guilty of blamable default, in refusing to complete the settlement under the terms demanded by the Receiver. That is

III-A That where petitioner had purchased all the assets of the partnership, except cash on hand, the receiver had no authority to demand that petitioner must pay additionally for miscellaneous credits of the partnership, and such as insurance paid ahead and the like.

III-B That where the order of sale recites that all questions as to the rights and interest of the partners, in the assets, had been finally determined; the Receiver was not authorized to require that petitioner must pay to the Receiver, $60,000 to cover costs of the Receivership; when no such claim against petitioner had been determined by the Court.

III-C That where $35,000 of Receivership costs had been paid from partnership funds—and of which $17,500 had been paid from petitioner's share of the said fund; the Receiver was not authorized to require that petitioner should pay the receiver over again for that said $17,500.

III-b The Court below erred in failing to hold: that the filing of petitioner's appeal of March 10th, against the order confirming sale; stopped the execution of that order; and so stopped the run-

ning of the time limit against petitioner, before the expiration of said time limit; and so that petitioner could not be guilty thereafter of default.

IV. The Court below erred in failing to hold and direct; that since the alleged default by petitioner was not due to any fault of petitioner; that the sale of the partnership business to petitioner must, therefore be completed; and that the partnership business must be turned over to petitioner, under the terms of the original order of sale; and as of the original sale date, Feb. 1st, 1944.

V. The Court below erred in failing to hold and direct that Respondent must account to the partnership for the more than $65,000 that has been paid Respondent, as a so-called salary by the receiver, during the 12½ years of the receivership.

VI. The Court below erred in failing to hold and direct, that the final terms of settlement by petitioner, for the partnership property, should be made subject to a proper accounting between the partners, as to partnership affairs.

Reaons Relief on for the Allowance of the Writ:

I. By Dismissing appeal No. 8,770 as having been taken from a non-appealable order, the Court below has in effect:

A. ruler that a purchaser at a judicial sale has no right of appeal, against a subsequent adverse order affecting his interests, and this is contrary to the applicable ruling of this Court, in Kneeland v. American Loan and Trust Co., 136 U. S. 89; 34 L. Ed. 379.

B. Ruled that a party to a suit has no right to appeal from an interlocutory order, which is immediately executable, as in this case; and where it might cause irreparable injury to the party affected adversely thereby; and that holding is directly in conflict with the principle laid down by this Court in Forgay vs. Conrad, 6 How. 210; 12 L. Ed. 379.

C. Followed the obsolete rule of Butterfield vs. Usher, that an order setting aside a sale and ordering a resale is not appealable; and this is directly in conflict with the principle enunciated by this Court, in Kneeland vs. American Loan and Trust Co., 136 U. S. 89; 34 L. Ed. 379.

Respectfully submitted,

EDWIN J. CREEL.